U.S. Department of Labor

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Issue Date: 05 July 2007

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In the Matter of

R.C.H.,III[1]
Claimant
v.
SEA RAY BOATS, INC.
ZURICH AMERICAN INSURANCE CO.
Employer/Carrier
And
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest
…….

Case No. 2006 LHC 00645
OWCP No. 6-197306

Before: Stuart A. Levin
Administrative Law Judge

Decision and Order

This matter involves a claim for benefits filed under the Longshore Act. Claimant alleges that he injured his low back while working as a boat builder, installer/assembler on luxury yachts at Employer's Sykes Creek plant. Tr. 10, 25. He contends that he had a pre-existing back injury, sustained an aggravation of that condition bending, stooping, and lifting during the course of his employment and later exacerbated or re-injured his back lifting heavy doors on April 28, 2005. A few days later, he allegedly re-injured his back aboard a yacht under construction while cleaning a washer and dryer in a stateroom. Tr.10-11. In this proceeding, Claimant seeks only a determination of the compensability of his injury, medical benefits, and the authorization of Dr. Golovac as his treating physician. Tr. 47.

[1] Effective August 1, 2006, the U.S. Department of Labor implemented a policy to avoid using claimants' names in the caption or body of any Black Lung or Longshore decision or order. In lieu of identifying the claimant by name, the policy requires the use of the claimant's initials.

Employer responds that Claimant's condition is idiopathic. Tr. 13. It alleges that one of Claimant's co-workers advised a supervisor that Claimant was experiencing back problems and when the supervisor, on May 4, 2005, asked Claimant if he hurt his back, Claimant mentioned that he had been in a car accident many years before and that he felt a crunch in his back walking across the plant floor. Tr. 13-14. In Employer's view Claimant was not injured at work, failed to provide timely notice of injury, and has not provided a credible account of the circumstances under which the alleged injuries occurred. The parties stipulated that Claimant's average weekly wage is $735.59, Tr. 41, and agreed that other issues were not ready for hearing at this time. Tr. 42-50.

Findings of Fact

Claimant was hired at the Sykes Creek plant on February 19, 2002. Tr. 25, 56. His supervisor was Jim Carlile. Tr. 57. His duties entailed bending, lifting, stooping, crawling, and working in tight spaces. Tr. 25. At times, he was required lift doors weighing at least fifty pounds. Tr. 26.

Prior to his employment at Sea Ray, Claimant sustained neck and back injuries 1992 and 1996. Tr. 26-27. The record shows that he injured his back in 1992 while working at an apartment house complex, required medical treatment for several years, Tr. 53, and eventually received a lump sum settlement which extinguished further medical care for that injury. Tr. 54. Following that, he was involved in an auto accident in 1996. Claimant again received medical treatment for back injuries, and again he eventually settled his claim for a lump sum. Tr. 55. He testified that he recovered from both injuries before he went to work for Sea Ray. Tr. 27.

Claimant testified he started to experience back pain during the last six months he worked at Sea Ray, and he attributed his symptoms to "excessive workload." Tr. 27. Claimant acknowledged that he was aware of his Employer's policy requiring that accidents be reported immediately, Tr. 58; however, he did not report the problems because, according to Claimant, pulling muscles and back strains were routine in his job. Tr. 59.

He testified that he cannot give a definite date when he felt back pain, but the "onset" occurred when he lifted the doors, although he claims he had low back pain before that date. Tr. 28. Lifting the doors worsened his pain. Tr. 28. He explained that during the last workweek in April, 2005, either the 28th or 29th, Tr. 31, while working on a 680 Super Sport luxury yacht, he carried several 50 pound

doors, one by one, from one shop to another, a distance of about 50 yards, and then went to lunch. Tr. 29; 92; 98-99. Claimant explained that the six doors are installed only once during the construction of vessel, 68 feet or more, and it takes about three months to construct a large luxury yacht. Tr. 57-58.

The record shows that this incident occurred on Thursday, April 28, 2005. Claimant was off work on April 29. Ex. 7; Ex. 13; Tr. 166. Claimant ordinarily worked at Sea Ray from 6:00 a.m. to 4:30 p.m., Monday through Thursday, and occasionally overtime on Friday. Tr. 78; 120.

After lunch on April 28, 2005, and back at work, Claimant walked around a corner of the work table, and at hearing testified: "… my back caught and I thought my hip broke…." Tr. 29, 83; 93. At the time, he was not carrying anything. Tr. 93. According to Claimant, his supervisor was standing at the top of the stairs at the time. Tr. 29. Claimant testified that his supervisor called down to him: "Richard, what happened?" Claimant responded that: "I have no idea, something popped in my back," and his supervisor allegedly told him to: "go sit in the boat and rest." Tr. 93-94. In response to questioning by Employer's Counsel, Claimant confirmed that Sea Ray did not tell him how to walk. Tr. 83

Claimant testified that three of his friends witnessed the incident and asked him if he was alright, Tr. 93. None of these witnesses, however, were called to testify at the hearing. At his deposition, Claimant reported that his supervisor told him to "hang in there and you don't go to the doctor or anything …." Ex. 8 at 35. Claimant continued to experience problems, but he finished work that day.

After the weekend, Claimant returned to work, although, he testified, his back was "extremely sore." Tr. 30-31. Near the end of the day, he was sitting on a stool, cleaning a washer/dryer under a platform in a small space in the port stateroom of a 680 Super Sport when he felt pain in his low back and, at the hearing testified: "I lost it. It actually threw my body to where I fell on the floor and got, and was stuck in the corner; I couldn't move." Tr. 32; 94-96. A co-worker, Tim Grenet, picked him up and put him on the bed. Tr. 32; 96-97. Claimant asked Grenet to "cover for him" by sweeping up and letting him rest. Tr. 33; 98. He remained in the bed for about 45 minutes, and by the time he got up, everyone had gone home. Claimant, then, clocked out and went home. Tr. 33, 64. Grenet was not called to testify in this proceeding. Tr. 19-20.

The next day, the morning of May 4, 2005, when Claimant arrived at work, Carlile told him to see the nurse, Tr. 33, and, according to Claimant: "he didn't say

anything." Tr. 33. Claimant denied that Carlile spoke with him about his back or about any injury. Tr. 33, 60. Claimant testified that he told Carlile that he had previously felt a crunch in his back walking across the plant floor, and he also claims he told Carlile: "about the door part of it," because "that's what he asked me about." Tr. 61-63. Claimant testified that Carlile was present and witnessed the problem Claimant experienced when he felt the crunch while walking across the plant floor. Tr. 62. He further testified that he also told Carlile about the washer/dryer incident. Tr. 64-65.

Claimant does not know how his supervisor found out he had a back problem. Tr. 39. According to Claimant, his back problem is due to the excessive workload which wore him down. Tr. 51. In response to leading questions propounded by his counsel to which Employer did not object, Claimant attributed his condition to lifting the doors and cleaning the washer and dryer in the port stateroom of the 680 Super Sport. Tr. 51. Claimant testified that prior to the door incident he had developing back problems, but Carlile had not previously told him to see the nurse. Tr. 84.

At Carlile's direction on May 4, 2005, Claimant went to Nurse Goff's office, and she asked him what happened. Tr. 33-34. According to Claimant, he told the nurse about hurting his back while lifting the doors, while walking on the plant floor, and while cleaning the washer/dryer. Tr. 34, 63-64, 65. The walking incident occurred after he carried the doors. Tr. 34. Nurse Goff advised him to see his family doctor, Dr. Trevino, Tr. 35, and Claimant did so the following day. Tr. 36.

Claimant insists that he told Dr. Trevino's assistant that he hurt his back lifting heavy objects at work, but he could not recall if he mentioned the specific incidents. Tr. 66. Dr. Trevino's office notes show Claimant reported that the injury was a result of walking on April 29, 2005, (as previously noted, Claimant was uncertain of the exact date) and Claimant believes he "said something to that affect." Tr. 66. Dr. Trevino's assistant recommended that Claimant see Dr. Carter, an orthopedic surgeon. Tr. 36.

Claimant testified that he gave Dr. Carter his complete history including the incident lifting the doors, walking on the plant floor, and cleaning the washer and dryer. Tr. 36-37, 39. Claimant filled out a patient history form for Dr. Carter. On the form, Claimant reported that he was walking when the problem "first occurred." Tr. 8; Ex. 1, 37-38. He did not mention the problem arose six months before; nor did he mention the door lifting incident, the washer/dryer incident, or heavy lifting. Tr. 68-69. In response to a question on the form about how long he

had been experiencing the problem, Claimant responded "twelve days." Tr. 70; Ex. 1, 37-38. Dr. Carter diagnosed a bulging disk and recommended that Claimant not go back to work.

Dr. Carter eventually told Claimant there was little more he could do, and Claimant turned to Dr. Golovac for pain management. Tr. 40. Claimant testified that he told Dr. Golovac about the incident lifting the heavy doors and walking. Tr. 82. He could not recall whether he also told him about the washer/dryer incident. Tr. 82. Claimant could not recall whether he mentioned his prior back injuries to Dr. Golovac. Tr. 56.

On November 2, 2005, Dr. Golovac performed a purcutaneous discectomy, removing 30% of the disk. Tr. 79. Claimant denied that he told Dr. Golovac on November 22, 2005, that he had returned to work (with another employer) and re-injured the disc doing heavy lifting and denied he re-injured it. Tr. 80. Claimant testified that it was the procedure that aggravated his condition. Tr. 80.

The record shows that Dr. Carter had placed Claimant on light duty restrictions, but Sea Ray would not permit Claimant to return to his usual job. Tr. 86. On May 4, May 9, and two other days in May, Claimant reported that he was unable to return to work due to his back problem. Tr. 86-87. After seeing the nurse, Employer would not allow Claimant to return to work. Tr. 37, 87. He had bills to pay, however, and he took on light duty work at a bowling alley to earn money to feed his family and pay bills. Tr. 23-24, 38, 87-88.

The record shows that Claimant worked sporadically as a handyman at Shore Lanes Bowling Alley for almost 30 years. Tr. 71. Between January, 2005, and May 4, 2005, he had worked at Shore Lanes occasionally, and was paid sporadically. Tr. 71. Claimant testified that while he was unable to work at Sea Ray after May 4, 2005, he worked at Shore Lanes. Tr. 38.

After May 4, 2005, Claimant applied for unemployment and short term disability. Tr. 38, 72. On the Group Disability Insurance Application, Claimant stated that his injury was not work-related. Tr. 73; Ex. 6. He could not recall whether he advised the disability carrier that he was working at the bowling alley, Tr. 76-77, and explained that he was not attempting to deceive the disability carrier but thought that an injury from walking and carrying the doors at work was not a work-related injury. Tr. 75. He could not explain the apparent discrepancy between the representation on the insurance claim and his alleged reports to Nurse Goff and Carlile that he was injured at work lifting the doors, walking across the plant floor,

and cleaning the washer/dryer. Tr. 75. At his deposition, Claimant testified that he did not file for workers' compensation because he did not "know what I had done to myself," but he did allegedly know that whatever he did, he "did it at work." EX. 8 at 31.

While working at the bowling ally, Claimant was visited by Carlile and Baumen who instructed him to come to Sea Rays human resources office the next day, Tr. 77-78, which he did, and was fired, effective June 30, 2005. Tr. 88-89; 23. Claimant testified that the reason he was working at the bowling ally rather than Sea Ray was Sea Rays refusal to allow him to return unless he work full duty. Tr. 90.

Claimant acknowledged that two days before Carlile and Baumen visited him at the bowling alley; he might have called nurse Goff and told her that his back was so bad he had trouble putting on his pants and socks. Tr. 91. He also acknowledged that the next day, June 28, 2005, the assembly manager, Randy Serfozo, saw him working at the bowling alley. Tr. 91.

Claimant is currently working as a maintenance man at an apartment house, at $15.00 per hour, 40 hours per week, Tr. 22, and also worked at Shore Lanes Bowling as a light maintenance man. Tr. 23.

James D. Carlile is the assembly supervisor at the Sykes Creek Plant, and Claimant's direct supervisor. Tr. 119-120. He confirmed that Claimant worked 4 ten-hour days per week. Tr. 120. He testified that he first learned that Claimant was having back problems from Tim Grenet who approached him at the end of the workday. Tr. 121. Grenet told him Claimant's back was bothering him and that he had helped Claimant clean the port stateroom, Tr. 137; 141, but Carlile testified that Grenet did not mention to him that Claimant had fallen off a stool or that he had to help Claimant to get off the floor or help him lay down in the bed, Tr. 142, or that Claimant needed any further assistance. Tr. 144. After Grenet reported to him, Carlile checked Claimant's time punch on his computer and saw that Claimant had clocked out for the day. Tr. 143.

Since the employees had gone home, Carlile waited until the next workday to speak to Claimant. Tr. 122. Prior to that, Claimant had never mentioned anything to him about an accident or any back problems. Tr. 121. Carlile denied that he witnessed Claimant experiencing difficulty walking across the plant floor after a break on April 28, 2005. Tr. 139. He denied that was standing on top of a staircase as Claimant turned a corner after returning from lunch. Tr. 139. He

denied that he ever saw Claimant experience difficulty walking at work, and he denied that he ever asked Claimant, prior to receiving the reports from the co-workers, whether he was alright or experiencing a problem. Tr. 139-40.

Carlile testified that following Grenet's report that Claimant's back was bothering him, he later confirmed with Mike Archer and Tim Burgess that Claimant had been complaining about his back. Cx. 2; Ex. 22; Tr. 135-37. None of the co-workers, however, reported that Claimant was injured cleaning the washer/dryer or lifting doors. Tr. 137-38; 141.

The next workday, May 4, 2005, Carlile told Claimant he had heard he had been complaining about his back, and asked him if he was okay. Claimant acknowledged that his back was bothering him, and Carlile asked him if it happened at work. Carlile testified that Claimant told him "no" he had injured his back in an accident several years previously. Tr. 122. Carlile confirmed that he then sent Claimant to see the nurse. Tr. 124.

Claimant insisted that he told Carlile about lifting the doors days before the washer/dryer incident, and that he told him about the washer/dryer incident in the nurse's office on May 4. Tr. 200. According to Carlile, however, Claimant did not mention lifting doors or cleaning the washer/dryer. Tr. 122-23. He mentioned only that he had felt something "pop" while walking across the shop floor. Tr. 123; Ex 22. In response to questions by Employer's Counsel, the record shows that the plant floor is flat and that Carlile did not tell Claimant how to walk. Tr. 129.

Carlile confirmed that, as part of Claimant's job duties, he would, from time to time, lift doors. He explained that it takes about 3 months to construct a 680 Super Sport, and the doors are stored in the fabrication building until they are ready for installation. Tr. 128. To the best of Carlile's knowledge, the doors were not in the boat at that time Claimant contends he was injured. Tr. 128-29. Carlile also confirmed that 680 Super Sport had a washer/dryer in the port stateroom. Tr. 132. At the time, three boats were under various stages of construction, including one 680. Tr. 133. One of Claimant's duties did involve cleaning the stateroom for inspection, but Carlile did not believe the yacht Claimant was building had reached the inspection stage of construction at the time Claimant indicates he was cleaning it. Tr. 134.

In response to Carlile's testimony that he did not believe they were putting doors on the yacht he was constructing, Claimant testified on rebuttal that he was pulled off the vessel he was working on and told to install doors on another vessel

that was further along in the construction process. Tr. 197-98. When asked why he had not mentioned before that he had been pulled off one boat to work on another, Claimant testified: "I was never asked." Tr. 201. At his October 6, 2005, deposition, however, Claimant was asked; and he testified that in April, 2005, he was working on the 680 Super Sport, and, that during that time period, he worked on "one" boat in the course of the week, and "the same boat literally for three months." Ex. 8 at 25.

After he was off about a week, Claimant returned to the plant and stopped by Carlile's office. Tr. 124. He advised Carlile that the nurse would not allow him to return to work because he had been placed on physical restrictions. Carlile testified that he did not offer Claimant a light duty job because he had none. Tr. 130-31. According to Carlile, Claimant told him he was getting better but injured himself again taking groceries out of his car. Tr. 125. Claimant, however, denied that he told Carlile after May 4, 2005, that he injured his back lifting groceries out of his car, and testified: "I have no knowledge of that." Tr. 70.

Janis Goff is the occupational health nurse at the Sykes Creek Plant. Tr. 147. She first saw Claimant for his back pain on May 4, 2005. Tr. 149; Ex. 12. Nurse Goff testified that Claimant reported that he had two major back injuries in the past and had been through months of therapy, but the recent incident occurred when he started feeling weakness then suddenly felt his back "crack" as he was walking across the plant floor. Tr. 149-50. Nurse Goff testified that she determined on May 4, 2005, that Claimant's condition was non-occupational because he did not tell her that he hurt his back at work. He stated to her that he did not know how he injured it. Tr. 158-59. She advised Claimant to see his doctor. Tr. 150. Nurse Goff's May 4, 2005 report states that Claimant advised that he had "no idea" how his recent back pain started, but he felt his back "crack" while walking across the plant floor. Cx. 9; Ex. 12(EX. 12 is bound out of order and follows EX. 21). She denied that Claimant told her about the door lifting incident or the washer/dryer incident. Tr. 150. Claimant however, insisted that he told Nurse Goff about both incidents. Tr. 202-03.

Later on May 9, 2005, she reported that Claimant called in and advised, among other things, that he was in pain and having difficulty putting on his pants and tying his shoes. Cx. 9; Ex. 12.

The record shows that on May 9, 2005, Claimant returned to the plant seeking light duty work, and later, on May 12, he came back with a doctor's note placing him on restrictions. Tr. 151. Nurse Goff then contacted Carlile who

advised her that he had no light duty work. Tr. 152. On May 16, Claimant called her and again expressed his desire to return to work, but he was still on restrictions. Tr. 152; 155. On May 31, he called her to inquire about his short term disability. Tr. 152-53. On June 27, 2005, Claimant called her again to report that he was not receiving much benefit from physical therapy, that he was still in pain and was having difficulty putting on his pants and tying his shoes. Tr. 154.

Randy Serfozo is the assembly manager at Sea Ray's Sykes Creek Plant. Tr. 103-04. He knew Claimant was off work due to a back problem, but at several production meetings it was mentioned that someone had seen him working at a bowling alley. Tr. 104-05; 114. Serfozo decided to check for himself. On afternoon of June 28, 2005, on his way back from lunch, Tr. 106-07, he stopped by the bowling alley. He saw Claimant working outside the facility, picking up trash and carrying 4 x 4 wooden pallets, estimated to weigh 35-40 pounds, from a debris pile to a dumpster. Tr. 105; 111; Ex. 21. Claimant had no apparent difficulty carrying the pallets, Tr. 106-07; 111, and when Serfozo returned to work, he reported his observations to the Human Resources Department. Tr. 106-07.

At the time, Claimant was not working at Sea Ray and not being paid. Tr. 108. Serfozo knew he was out of work due to back pain, Tr. 108, but was not aware of the nature and extent of Claimant's injuries or his actual restrictions. Tr. 115-116. He was also unaware that Claimant had been released for light duty work, had tried to return to work at Sea Ray, and had been told there was no light duty work available at Sea Ray. Tr. 108-09; 114.

Serfozo testified that personnel decisions regarding Claimant's situation were handled by the HR Department. Tr. 110-112. As plant manager, however, it would concern him if a worker who could physically do his job was out with an alleged back injury and was found working somewhere else. Tr. 113-114. He acknowledged that Sea Ray has a policy of trying to go as many days as possible without an accident. Tr. 112.

The record shows that when Carlile learned that Claimant was working at Shore Lanes Bowling Alley, he and Lisa Bauman, Sea Ray's human resources manager, Tr. 162, decide to visit Claimant at the bowling alley to confirm the report that he was working there. Tr. 129-30, 169. Carlile was unsure whether Claimant was being paid by Sea Ray at the time. Tr. 130. According to Carlile, Bauman asked Claimant about his ability to work and told him he had been seen lifting wooden pallets. Claimant acknowledged that he had lifted the pallets, and,

according to Carlile, stated that he could lift the table they were sitting at over his head, but he just could not do it all day. Tr. 127.

Bauman testified that Sea Ray's ethics guide, Ex. 15, prohibits an employee from working at any job that impacts his or her ability to perform the duties at Sea Ray; "that would draw the employee away from being at work." Tr. 173. Bauman was aware that Claimant had wanted to return to work at Sea Ray, but his restrictions could not be accommodated. Tr. 175-77,190. She was not, at the time, aware of whether he had received any short term disability payments, Tr. 177, but she later learned they were paying him late. Tr. 186; 193. She knew that Claimant applied for unemployment and that Sea Ray fought it, but lost on appeal. Tr. 187.

Bauman testified that the work Claimant did at the bowling alley, bending and putting trash in the dumpster, indicated that he was capable of doing more than his restrictions indicated, and if he was released to: "even be able to do a part of what he was observed doing we certainly would have worked him…" Tr. 179. She noted that Claimant had reported to the nurse that he was unable to put on his pants or tie his shoes, Tr. 174, but was observed that next day working in another job that involved bending and lifting, Tr. 180-81, although, based on information from Nurse Goff, she believed that Claimant's restrictions included "no bending." Tr. 191.

The next day, June 30, 2005, Claimant was terminated. Tr. 127, 168. Claimant had acknowledged that he had been worked off and on at the bowling alley for 30 years, Tr. 126-27, and was working at the bowling alley at the time because disability was enough to cover his bills. Tr. 170. Bauman explained, however, that Claimant was terminated because it was determined that he was working for another employer while he was out on disability. Tr. 169. To qualify for short term disability, an Employee must have a non-work related illness or injury. Tr. 168. Sea Ray's management team decided he should be terminated, Tr. 170, and his short term disability was terminated because he was working and did not disclose it. Tr. 187.

The record shows that Sea Ray employees are required to report all injuries immediately. Tr. 163; Ex 23. Accidents at Sea Ray are tracked and recognition and bonuses are given to the entire facility if certain goals are met. Tr. 181-82.

Medical Evidence

Dr. David Trevino is an internist and Claimant's family doctor since May 20, 2003. On May 4, 2005, Claimant visited Dr. Trevino's office for low back pain and was seen by a physician's assistant. Dep. at 5-7.

Dr. Trevino was deposed on October 20, 2006. Ex. 26. He reviewed the assistant's office notes. Dep. at 7-8. These notes show that the onset of symptoms for the low back problem occurred while Claimant was walking and heard a "popping" sound. Ex. 26, Dep. at 9. While Claimant insisted that he told Dr. Trevino's office assistant about both the door lifting incident and the washer/dryer incident Tr. 202-03, neither incident was not mentioned in the office notes, but a history of chronic pain was mentioned. Dep. at 10-11.

Claimant visited Dr. James E. Carter, a Board-eligible orthopedic surgeon, on May 11, 2005, and filled out a Patient Information Form. Ex. 1; Ex. 25. In response to the question: "how did the accident (injury) occur;" Claimant responded: "First while walking - second sitting down." In a statement of patient history taken on the same day, it is reported that: "He 12 days ago suffered a catch in his back while walking and then 4 days after that while cleaning a refrigerator he was unable to stand." Ex 25, Dep. at 5; Cx. 2. Dr. Carter scheduled an MRI and provided Claimant with a return to work slip with restrictions against heavy lifting, working on ladders, and excessive bending. Ex. 25, Dep. at 8.

On May 16, 2005, Claimant returned to Dr. Carter and asked to be released to work without limitations, but Dr. Carter refused, and noted that Claimant was temporarily totally disabled. Ex. 25. On May 25, 2005, Dr. Carter reported that the MRI revealed a paracentral disc protrusion at L4/L5, and noted that Claimant aggravated his back lifting groceries out the trunk of his car. Ex.1; Ex. 25, Dep. at 10; Ex. 25.

On the insurance claim form Dr. Carter completed on May 31, 2005, he reported that Claimant was temporarily totally disabled for "any occupation" for "duration unknown -- 6 weeks or more." He stated that Claimant's symptoms first appeared on May 1, 2005, and he checked the box indicating that the symptoms were related to an injury; however he followed that with a "?". Ex. 1; Ex. 25.

At his deposition on October 20, 2006, Dr. Carter testified that based on his review of the MRI, he could not determine whether the disc problem was

traumatically induced or degenerative. Dep. at 10. Dr. Carter denied that Claimant ever gave him a history of lifting doors or cleaning a washer/dryer. Dep. at 16. He testified that Claimant told him he was walking and cleaning a refrigerator at home. Dep. at 16. Claimant testified that when Dr. Carter indicates he was cleaning a refrigerator, that is incorrect because he was cleaning the washer dryer. Tr. 85-86, 90. Claimant denied that any incident occurred involving a refrigerator. Tr. 57.

When asked to assume that the washer/dryer incident occurred as Claimant described it, Dr. Carter agreed that it contributed to his overall back condition. Dep. at 18. He also opined that lifting 50 pound doors could have caused his back problem. Dep. at 18. Dr. Carter testified, however, that he would have expected Claimant to report such incidents. Dep. at 19. Cleaning out the refrigerator apparently was significant to Claimant and, according to Dr. Carter, it was reported to him. Dep. at 20.

Dr. Carter administered conservative treatment, including injections, and eventually recommended that Claimant see Dr. Golovac. Ex. 25.

On October 4, 2005, Claimant visited Dr. Stanley Golovac, an anesthesiologist and interventional pain specialist. Dep. at 5. In reporting the history of Claimant's injury, Dr. Golovac recorded that: "He was lifting heavy doors and had to carry them approximately 50 yards. He had to take them upstairs and then downstairs inside a boat." Dep. at 6 Cx. 1; Ex. 1; Ex. 11; Ex. 25; Dr. Golovac recommended injection therapy, followed, if necessary, with a transforaminal percutaneous discectomy.

Dr. Golovac was deposed on September 26, 2006. Cx. 13, Dep. at 3. He testified that he examined Claimant, reviewed his clinical studies, and diagnosed radicular pain pattern, paracentral disc protrusion at L4/L5; and discogenic etiology at L4/L5, and L5/S1. Dep. at 7. Dr. Golovac opined that disc protrusions are usually due to trauma not degenerative changes, Dep. at 26, and, based on the history he received, he believes Claimant's condition is causally related to the injuries he described. Dep. at 8.

Dr. Golovac administered epidural injection with improvement in pain and later performed a percutaneous discectomy. Dep. at 10. During a follow-up visit after the discectomy, Dr. Golovac reported on November 22, 2005, that Claimant was lifting something quite heavy at work and "blew out his disc again." Dep. at 11-12. Thereafter, Claimant underwent additional injection treatment, a discogram, and another discectomy on February 27, 2006. Dep. at 14. A July 13, 2006, MRI

showed that Claimant had developed a different problem at L4/L5, but Dr. Golovac was unsure of its etiology. Dep. at 15. As of August 2, 2006, Dr. Golovac believed that Claimant had not reached maximum medical improvement, and that all of his symptoms as of that date were due to lifting the heavy doors while he was employed by Sea Ray. Dep. at 17-18. He related all of Claimant's symptoms to Sea Ray because: "He didn't have an injury prior to that, and I never saw him for any other reason other than what he stated." Dep. at 19.

Dr. Golovac's opinion regarding the etiology of Claimant's condition was based upon the history provided by Claimant, Dep. at 20, 24. If, however, Claimant told Dr. Carter he injured his back while walking, Dr. Golovac testified that would be inconsistent with the history Claimant gave him. Dep. at 22. It would also, according to Dr. Golovac, be inconsistent if Claimant told Dr. Carter that he was cleaning a refrigerator and was unable to stand, Dep. at 23, or reported to Dr. Carter that he had injured his back many years before lifting heavy equipment, Dep. at 23, and again in a car accident ten years previously, or that he hurt his back lifting groceries on May 25, 2005. Dep. at 24. According to Dr. Golovac, Claimant did not provide him with a history which included any of these incidents. Dep. at 23. Dr. Golovac further confirmed that the history Claimant gave to Dr. Trevino was inconsistent with the history Claimant gave him. Dep. at 24.

Upon consideration of Claimant's history of prior back injury, Dr. Golovac did not believe the incident lifting the doors was the most likely cause of Claimant's current back condition. Rather: "It may have been an aggravating factor…. But it most certainly could have occurred much earlier…." Dep. at 27-28. Lifting the doors would aggravate the condition. Dep. at 28. Lifting up and installing an appliance would also be an aggravating factor, Dep. at 29, but Dr. Golovac had no history indicating Claimant was asked to install any appliances. After the percutaneous discectomy, Claimant did tell him on November 22, 2005, that he aggravated his condition through heavy lifting at work. Dep. at 29.

Dr. Michael Broom, an orthopedic surgeon, was deposed on September 11, 2006. Ex. 5. On July 19, 2006, he examined Claimant, obtained a symptom history which included Claimant's prior accidents and the incident lifting six 50-pound doors, and his pain experience while walking. Dr. Broom's written report does not mention the washer/dryer incident. He also reviewed the results of the lumbar MRI, revealing the L4/L5 disc herniation. Ex. 5 at 12. A 1994 report by Dr. Newman noted radiculopathy which suggested L5 radiculopathy and possible S1 radiculopathy. Ex. 5 at 13. Dr. Broom noted that Claimant's condition was consistent with a slow progression due to his pre-existing injuries, but "the history

we receive from the patient is more important in that regard as to what precipitated symptoms." Ex. at 16.

Dr. Broom testified that if Claimant's low back condition developed after he lifted heavy doors, his condition "likely would relate to that. But if it just came on while walking without any antecedent physical work, then I'd be more likely to consider a spontaneous type herniation." Ex. at 19-20. If Claimant's condition was triggered by walking, Dr. Broom would not consider it an injury, Ex. 5 at 19, but a "spontaneous herniation" due to a "non-work related activity." Ex. 5 at 22.

Dr. Broom confirmed that in assessing causal relationship, the patient history is, in his opinion, the most important thing to consider. Ex at 23-24. He does, however, expect the patient to be honest in reporting his injury history. Ex. 5 at 27. In this instance, based upon Claimant report of lifting heavy doors, his current condition is work-related. Ex. at 23-24. Further, installing and cleaning a washer/dryer would aggravate his condition. Ex. 5 at 25-26, 27. Claimant told Dr. Broom only about the incident lifting doors. He did not tell him about the washer/dryer incident. Ex. 5 at 28. Dr. Broom did, however, note an incident involving a refrigerator in Dr. Carter's notes, but the note did not indicate the incident occurred at work. Ex. 5 at 29.

Injury Claims

The record shows that on the Group Disability Insurance Claim Form, dated May 18, 2005, Claimant was asked: "Is the injury work related," and he responded: "no." Ex. 6.

On his LS-203, Claimant reported that he was injured lifting heavy doors. Ex. 4

Claimant indicated on his LS-18 that he was injured "lifting heavy doors." Ex. 17

Conclusions of Law

Prima Facie Case

Claimant argued at the hearing, and again in his post-hearing brief, that Section 20(a) of the Act provides him with a presumption that his condition is causally related to his employment. Citing his own testimony that conditions at work and three specific accidents on the job caused him pain and medical opinion

evidence attributing his condition to the incidents at work, Claimant seeks to invoke the presumption. The record here establishes that Claimant twice injured his low back many years before he went to work for Sea Ray. Yet, if he re-injured or aggravated his back at work, aggravation of a pre-existing condition is compensable. Gardner v. Bath Iron Works Corporation., 11 BRBS 556 (1979), *aff'd sub.nom.*, Gardner v. Director, OWCP, 640 F.2d 1385 (1st Cir. 1981); Preziosi v. Controlled Industries, 22 BRBS 468 (1989); Janusziewicz v. Sun Shipbuilding and Dry Dock Co., 22 BRBS 376 (1989) (decision and order on remand); Johnson v. Ingalls Shipbuilding, 22 BRBS 160 (1989); Madrid v. Coast Marine Construction, 22 BRBS 148 (1989). Moreover, an employment-related injury need not be the sole or primary cause of disability if it contributes to, combines with, or aggravates a pre-existing disease or underlying condition. Strachan Shipping v. Nash, 728 F.2d 513 (5th Cir. 1986); Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (9th Cir. 1966); Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989); Mijangos v. Avondale Shipyards, Inc., 19 BRBS 15 (1986); Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986); *See*, Merill v. Todd Pacific Shipyards Corporation., 25 BRBS 140 (1991), *aff'd*, 892 F.2d 173, 23 BRBS 12 (CRT) (2d Cir. 1989).

Further, Claimant is not required to introduce affirmative medical evidence establishing that the working conditions in fact caused the alleged harm. Sinclair v. United Food & Commercial Workers, 23 BRBS 148 (1989); O'Kelley v. Dep't of the Army/NAF, 34 BRBS 39 (2000). Nor need he prove that a particular incident or working conditions, in fact, caused the alleged harm. He need only establish the "minimal requirements" of a prima facie case. Brown v. I.T.T./Continental Baking Co., 921 F.2d 289, (D.C. Cir. 1990). Without the aid of the presumption, Obert v. John T. Clark & Son of Maryland, 23 BRBS 157 (1990); Kooley v. Marine Industries Northwest, 22 BRBS 142 (1989); Mackey v. Marine Terminals Corp., 21 BRBS 129 (1988), Claimant must prove that he suffered a harm and that an accident[2] at work or his working conditions could have caused harm. Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191 (1990); *see also*, Bath Iron Works v. Brown, 194 F.3d 1, (1st Cir. 1999); Hargrove v. Strachan Shipping Co., 32 BRBS 11, aff'd on recon., 32 BRBS 224 (1998); Care v. Washington Metropolitan Area Transit Authority, 21 BRBS 248 (1988); Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 275 (1981); Jones v. J. F. Shea Co., 14 BRBS 207 (1981); Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336 (1981). Only after Claimant satisfies his burden of proof does the presumption operate to

[2] An "accident" has been defined as an exposure, event, or episode. Perry v. Carolina Shipping Co., 20 BRBS 90 (1987).

link the harm to the employment. Noble Drilling Co. v. Drake, 795 F.2d 478, (5th Cir. 1986).

Claimant's Burden of Proof

As the courts and the Board have defined it, a claimant's initial burden is not especially onerous; but he must satisfy it before the presumption is available. In this instance, Claimant, in his post-hearing brief, relies upon the reports of his co-workers, the physician's who examined him, and his own testimony as evidence in support of his prima facie case. As discussed below in detail, however, the co-workers reported only that Claimant complained that his back was bothering him, but none were called to testify as a witness to the incidents Claimant described. Similarly, the physician testimony Claimant invokes is dependent upon the injury and symptom histories Claimant provided. As such, Claimant's credibility in reporting the incidents is crucial.

The Board and the Courts agree that a claimant's credible complaints of pain, Welch v. Pennzoil Co., 23 BRBS 395 (1990), coupled with his credible reports that an incident occurred or working conditions existed which could have caused the harm may be sufficient to establish a prima facie case prerequisite to Section 20(a) invocation, Stevens v. Tacoma Boatbuilding Co., 23 BRBS 191 (1990). As a corollary principle, however, it is equally clear that discredited testimony will not support a prima facie case. *See,* U. S. Industries, Inc. v. Director, 455 U.S. 608, (1982), (discredited testimony of claimant and a corroborating co-worker who claimed to have witnessed accident is insufficient to conclude that a work-related accident occurred); *See also,* Sharp v. Marine Corps Exch., 11 BRBS 197 (1979); Bartelle v. McLean Trucking Co., 14 BRBS 166 (1981), aff'd, 687 F.2d 34, (4th Cir. 1982); *accord*, Jones, *supra;* Mackey v. Marine Terminals Corp., 21 BRBS 129 (1988) (When the only evidence that claimant sustained a harm emanated from discredited testimony, the record failed to establish the occurrence of an injury). Before invoking the presumption, it is, therefore, necessary to assess Claimant's credibility in this matter.

The Alleged Incidents

In this proceeding, Claimant attributed the onset of his back pain to four etiologies: his working conditions in the form of an "excessive workload," bending, lifting, stooping, twisting, and working in tight spaces during a six month period prior to the time he reached the point that he was no longer able to work; an incident prior to the lunch break on April 28, 2005, when he allegedly lifted six

heavy doors which he carried, one by one, about 50 yards in preparation to their installation in a yacht under construction; an alleged incident on April 28, 2005, after lunch, when he felt his back “catch” while walking across the plant floor; and an incident on May 3, 2005, which allegedly occurred while Claimant was cleaning the washer/dryer in the port stateroom of the yacht. At the hearing, Claimant attributed his condition to all four circumstances in combination. At other times, he variously attributed his condition to the individual incidents.

Claimant’s Credibility

A review of the medical evidence reveals that Claimant’s report describing the history of his injuries was a key factor in the etiology assessments provided by his physicians. The doctors who examined him, to a large extent, relied upon the medical history Claimant provided about the incidents which triggered the onset of his pain. Dr. Golovac, for example, testified that his assessment of the etiology of Claimant’s condition was based upon the history of lifting heavy doors provided by Claimant, and Dr. Broom confirmed that, in assessing causal relationship, the patient history is, in his opinion, the most important factor to consider. This is, of course, not an observation critical of the doctors. They customarily and routinely rely upon their patients’ symptom history and incident accounts in formulating etiological assessments. When a witness is not credible, however, his reports which describe how his injuries occurred undermine the foundation of his doctor’s etiology assessment. Moreover, the evidence a claimant provides relating to the whether an injury occurred is entitled to no greater weight merely because it has been filtered through a physician or other health professional and appears in a medical report. When a claimant is not credible, it taints the medical opinions which rely upon it; and Drs. Trevino, Carter, Golovac, and Broom all discussed the limitations in the injury history reports Claimant provided to them. In this instance, then, whether or not the presumption is available depends, in large measure, upon Claimant’s credibility.

Upon review of the record considered in its entirety, substantial evidence persuades me that Claimant was not a credible witness either in testimony at the hearing or when he advised his doctors that specific incidents at work caused his injury. I, of course, recognize that insignificant discrepancies in a claimant's account of the manner in which an injury occurred do not necessarily impeach his credibility. If the discrepancies fall "within an expected range" of variation and the witness’s demeanor is not otherwise questionable, the testimony may be deemed credible notwithstanding the discrepancies. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990), (delay in providing accident report); Conoco, Inc. v. Director,

33 BRBS 187 (5th Cir. 1999) (exact location of the impact of the turnbuckle on her body, particulars about the accident scene); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); *see also*, Universal Maritime Corp. v. Moore, 126 F.3d 256, (4th Cir. 1997). The discrepancies here, however, are neither insignificant nor within any "expected range" of reasonable variation.

The record shows that Claimant, from time to time, attributed his low back problem to his general working conditions and to three specific incidents. At times, he identified one incident as the cause of his injury; at the hearing he identified all four causes, individually, and in combination. Each of his allegations is examined below.

Working Conditions

At the hearing, Claimant testified that the conditions of his employment, in particular, an excessive workload, triggered low back discomfort about six months before he allegedly injured his back lifting heavy doors. In his post-hearing brief, he argued that repetitive bending, stooping, twisting, working in tight spaces, and lifting could have caused a disc herniation. Cl. Br. at 8, 12. Employer responded that the record lacks substantiation that Claimant had any symptoms during that time. He sought no medical treatment, visited no doctor, and voiced no complaints to co-workers or to his Employer, Emp. Br. at 24-25, despite Employer's personnel policy, with which Claimant was familiar, requiring employees to report any work-related injuries they may have sustained. Claimant testified, however, he failed to report an injury due to an excessive workload because he deemed the discomfort he was experiencing a consequence of normal everyday aches and pains routinely experienced by hardworking craftsmen.

It is, of course, well settled that a claimant's credible testimony regarding his "working conditions" may be sufficient to establish an element of his prima facie case. Quinones v. H.B. Zachery, Inc., 32 BRBS 6 (1998), rev'd on other grounds, 206 F.3d 474, (5th Cir. 2000). Yet, in this instance, even after the problem allegedly developed beyond routine aches and pains, Claimant never mentioned to his supervisor any sort of problem due to an excessive workload. He apparently complained to his co-workers that his back was "bothering" him, and his co-workers mentioned Claimant's back problem to his supervisor; but the record is devoid of evidence indicating Claimant's co-workers suggested his problem was attributable to anything at work or his working conditions, and the co-workers were not called to testify in this proceeding.

The record further reveals that Claimant never mentioned to Nurse Goff, Dr. Trevino, Dr. Carter, Dr. Golovac, or Dr. Broom that excessive workload or repetitive bending, stooping, twisting, working in tight spaces, or lifting anything triggered low back symptoms six months before April 28, 2005, the day Claimant allegedly lifted the heavy doors. Nor did Claimant mention on the insurance claim form he filed, or on his Department of Labor LS-18 form, or on his Department of Labor LS-203 form that the onset of his symptoms occurred several months before he left work and were attributable anything but lifting the doors on April 28, 2005.

While Claimant's explanation that he initially attributed his problem to normal aches and pains is plausible; it does not explain Claimant's failure to mention his working conditions once he knew his condition was not merely routine soreness. Claimant's failure to report any injury as a result of an excessive workload or repetitive movement, coupled with his failure to mention it to any of his physicians or report it on the legal forms he filed seeking disability insurance and compensation under the Longshore Act, render his testimony regarding the conditions of his employment as an etiology of his low back symptoms less than credible.[3] Thus, the record is insufficient to invoke the presumption based upon the notion that an excessive workload or repetitive lifting, bending, stooping, twisting, or working in tight spaces could have caused Claimant harm prior to April 28, 2005.

Under circumstances in which the only evidence a claimant sustained a harm emanates from his discredited testimony, the Board has concluded that the record failed to establish the occurrence of an injury. Mackey v. Marine Terminals Corp., 21 BRBS 129 (1988).[4] In this instance, the record contains no medical or other evidence Claimant suffered any harm working at Sea Ray anytime prior to April 28, 2005; and Claimant's testimony at the hearing that he suffered some sort of harm at work prior to that date is not credible. The presumption is, therefore not available based upon Claimant's alleged excessive workload, and alleged repetitive lifting, bending, stooping, twisting, or working in tight spaces. *See*, Sanders v. Alabama Dry Dock & Shipbuilding Co., 22 BRBS 340 (1989) (rejecting the "working conditions" element in the absence of credible testimony). Bolden v. G.A.T.X. Terminals, Corp., 30 BRBS 71 (1996) (inconsistencies in claimant's testimony undermine an essential element of his prima facie case).

[3] The Board has determined that in evaluating a claimant's credibility, statements made on legal forms such as an LS-18, may be considered. Hartman v. Avondale Shipyard, Inc., 23 BRBS 201 (1990), vacated, in part on recon., 24 BRBS 63 (1990).

[4] In Mackey, although the reports of two doctors contained objective evidence of an injury to the claimant's right eye, the Board determined that the claimant's testimony was properly discredited and concluded there was no objective evidence to establish the occurrence of a work-related injury.

Lifting Doors

Claimant testified he injured his back on April 28, 2005,[5] when he lifted six heavy doors and carried them, one by one, a distance of about fifty yards in preparation to installing them on 680 Super Sport luxury yacht. Claimant explained that the installation of six doors is done only once during the construction of large boats, 68 feet or more, and it takes about three months to construct a large yacht.

Claimant insists that he told his supervisor, Jim Carlile, on May 4, 2005, that he had previously felt a crunch in his back walking across the plant floor, and also told Carlile: "about the door part of it." When called to testify on rebuttal, Claimant again insisted he told Carlile about the incident lifting the heavy doors. Carlile, however, denied that Claimant ever mentioned to him anything about lifting doors.

Claimant testified that he also told the nurse about hurting his back while lifting the doors. Nurse Goff testified that Claimant advised her that he had "no idea" how his recent back pain started, but he felt his back "crack" while walking across the plant floor. Like Carlile, she, too, denied that Claimant mentioned anything about lifting doors at work.

The next day, Claimant went to his family physician, Dr. Trevino. Claimant testified that he told Dr. Trevino's assistant that he hurt his back lifting heavy objects at work, but he could not recall if he mentioned the specific incidents. Dr. Trevino's office notes indicate that Claimant reported that the injury was a result of walking, and Claimant believes he "said something to that affect." The office notes do not, however, mention lifting doors or heavy objects as part of the accident history Claimant reported to Dr. Trevino's office.

Claimant testified that told Dr. Carter about the incident lifting the doors and gave him his complete history. The record shows Claimant filled out a patient history form and stated he was walking when the problem "first occurred." At his deposition, Dr. Carter agreed that lifting 50 pound doors could cause a back problem, but he denied that Claimant ever gave him a history of lifting doors. Dr.

[5] At times, Claimant described this incident as taking place on April 28, 2005, at times he placed it on April 29, 2005. The record shows that Claimant did not work on April 29, 2005, however, this discrepancy in Claimant's recollection is, in this instance, within the normal range of variation since Claimant did explain that it occurred on the day before he left for the weekend.

Carter testified, further, that he would have expected Claimant to report such an incident.

Claimant testified that he also told Drs. Golovac and Broom about the incident lifting the heavy doors, and the records of both physicians confirm that the incident was included in the accident history Claimant provided. Indeed, lifting the doors was the only incident Claimant mentioned to Dr. Golovac, and, based upon that history, Dr. Golovac attributed Claimant's condition to that incident. Dr. Golovac testified further, however, if Claimant told Dr. Carter and Dr. Trevino he injured his back while walking that would be inconsistent with the history Claimant gave him. It would also, according to Dr. Golovac, be inconsistent if Claimant told Dr. Carter that he was cleaning a refrigerator and was unable to stand, or reported to Dr. Carter that he had injured his back many years before lifting heavy equipment, and hurt it again in a car accident ten years previously. According to Dr. Golovac, Claimant did not provide him with a history which included any of these incidents. Once given an overview of the various histories Claimant provided others, Dr. Golovac did not believe the incident lifting the doors was the most likely cause of Claimant's current back condition, but, if it occurred, he still considered it an aggravating factor.

Dr. Broom was also asked to consider the differing explanations for the injury Claimant provided to his various doctors. Dr. Broom testified that if Claimant's low back condition developed after he lifted heavy doors, his condition "likely would relate to that. If the condition just came on while he was walking without any antecedent physical work, then Dr. Broom would be more likely to consider a spontaneous herniation which, in his opinion, would not constitute an injury, but rather a "spontaneous herniation" due to a "nonwork-related activity."

Although Claimant maintains that he advised his supervisor and Nurse Goff of about the door-lifting incident and informed both Dr. Trevino and Dr. Carter about the incident when he sought their help, on May 4 and May 11, 2005, respectively; each specifically denied that Claimant ever mentioned anything about lifting heavy doors. Thus, Claimant's own family physician and his treating physician deny Claimant's account, and tend, instead, to corroborate the testimony of both Nurse Goff and Claimant's supervisor. Contradicting his testimony even further, of course, is the disability claim form Claimant executed on May 18, 2005, which also failed to mention the door-lifting incident.

Thus, the door-lifting incident surfaces for the first time in the October 4, 2005, report prepared by Dr. Golovac. It appears again in Claimant's LS-203,

dated October 12, 2005, in his LS-18, dated December 7, 2005, and in Dr. Broom's September 11, 2006 report; but the record reveals that Claimant, his testimony to the contrary notwithstanding, mentioned nothing about a door-lifting incident during a five-month period immediately after it allegedly occurred. Under these circumstances, Claimant's testimony that he mentioned the incident to his employer and physicians shortly after it occurred is not credible.

It is not, moreover, simply the evidence which contradicts Claimant's testimony about when he reported the incident which diminishes his credibility; inconsistencies and discrepancies in his testimony call into question whether the incident ever happened. Claimant's supervisor testified that he did not believe the yacht Claimant was constructing at the time was ready for installation of the doors. In response to his supervisor's observation, Claimant testified on rebuttal that he was pulled off the vessel he was building and told to install doors on another vessel that was further along in the construction process. When asked why he had not mentioned before that he had been pulled off one boat to work on another, Claimant testified: "I was never asked." Yet, at his October 6, 2005, deposition, Claimant was asked; and he testified that in April, 2005, he was working on the 680 Super Sport, and, during that time period, he worked on "one" boat, in the course of the week, and "the same boat literally for three months."

As a result, the record confirms that part of Claimant's duties included installing the doors aboard the yachts he constructed; however, the vessel to which he was assigned had not yet reached that stage of construction requiring door installation, and his explanation at the hearing that he was moving the doors to install them on another vessel is inconsistent with his deposition testimony and is not credible. The evidence further contradicts Claimant's testimony that he consistently reported this incident; and his deposition testimony contradicts the circumstances under which he testified at hearing that he was required to lift the doors.

I, therefore, conclude that Claimant's belated reports of the incident to Drs. Golovac and Broom and his testimony at hearing that the door-lifting incident occurred lack credibility. Indeed, evidence of this incident is wholly dependent upon Claimant's credibility, and, as such, the record is insufficient to conclude that the incident, in fact, occurred. It, therefore, follows that the weight accorded the etiology assessments by Drs. Golovac and Broom, which, as they both acknowledged, relied upon Claimant's report of this incident also lack credibility. The record is, accordingly, baron of credible evidence essential to establishing a prima facie case, and, as such, invocation of the Section 20 presumption, based

upon the notion that a door-lifting incident occurred on April 28, 2005, which caused harm to Claimant's low back, is inappropriate. *See*, Bolden v. G.A.T.X. Terminals, Corp., *supra*.

Walking Across the Plant Floor

After allegedly carrying the doors, Claimant went to lunch. Back at work after lunch, he was simply walking around the corner of the sewing table, carrying nothing, when he allegedly experienced a sudden and severe pain. As he explained it: "…my back caught and I thought my hip broke…." According to Claimant, his supervisor, Jim Carlile, was standing at the top of the stairs at the time, witnessed the incident, and Claimant testified that Carlile called down to him: "Richard, what happened." Claimant testified he responded: "I have no idea, something popped in my back," and Carlile allegedly told him to "go sit in the boat and rest." At his deposition, Claimant testified that his supervisor told him to "hang in there and you don't go to the doctor or anything..." In marked contradiction with Claimant's testimony, Carlile denied he was standing on top of a staircase or witnessed Claimant experiencing difficulty walking across the plant floor after the lunch break on April 28. He further denied that he ever asked Claimant, prior to receiving the reports from Claimant's co-workers, whether he was alright or experiencing a problem. Carlile's testimony, therefore, placed into question the credibility of Claimant's account that the walking incident occurred as Claimant described it.[6]

To be sure, Claimant attempted to buttress his contention by suggesting that three of his co-workers also witnessed the incident and that they, too, allegedly asked him what was wrong. Unfortunately, however, no co-worker who could have

[6] Employer vigorously argued that the experience of mere pain while simply walking across a plant floor does not constitute an injury, particularly under circumstances in which the Employer does not tell the worker how to walk or where to walk. Employer emphasized this point several times while questioning witnesses at the hearing, *See, e.g.*,Tr. 83; 129, and insisted in its post-hearing brief that the mere act of walking at work is not sufficient to constitute an accident, and if he experienced any pain from walking it was due to an idiopathic or spontaneous herniation, Emp. Br. at 20-21; but the argument is misplaced. It is a well-established principle that a compensable injury need not involve unusually dangerous employment conditions. Bell Helicopter Int'l v. Jacobs, 746 F.2d 1342, (8th Cir. 1984), aff'g Darnell v. Bell Helicopter Int'l, 16 BRBS 98 (1984). Under appropriate circumstances, a mere episode of pain at work may be sufficient to invoke the presumption. For example, in Volpe v. Northeast Marine Terminals, 671 F.2d 697, (2d Cir. 1982), an episode of chest pain at work was deemed sufficient to invoke the presumption, and in Quinones v. H.B. Zachery, Inc. 32 BRBS 6 (1998), the Board determined that the presence of back pain was a "harm," sufficient to focus attention upon the issue of whether the second prong of the prima facie case had been met. In Gooden v. Director, 135 F.3d 1066 (5th Cir. 1998), the court held that the Longshore Act provides compensation for accidental injury or death arising out of and during the course of employment and not merely those conditions caused by the employment. In this instance, it is a question of fact whether Claimant actually experienced the pain he described and whether the walking incident which allegedly triggered the pain ever occurred.

confirmed Claimant's version of the events was called to testify in this proceeding. Consequently, Claimant's statements in reporting the incident and his testimony about the incident exhausts the record evidence indicating that walking on the plant floor caused him a problem, and while this might otherwise be sufficient in other circumstances, there are discrepancies in Claimant's reports which reflect adversely on the credibility of this evidence.

Claimant testified that after the walking incident occurred, he continued to experience problems, but he finished work that day. According to Carlile, however, he first heard about Claimant's back problem the next week when Tim Grenet, a co-worker, advised him that he had helped Claimant clean the port stateroom of the 680 Super Sport because Claimant's back was "bothering him." Once alerted to Claimant's back problem, Carlile sent him to Nurse Goff's office the next time he saw him.

According to Claimant, he told the nurse about hurting his back walking on the plant floor. Nurse Goff, in contrast, testified that Claimant advised her he had "no idea" how his recent back pain started, but that he had two major pre-existing back injuries and had recently felt his back "crack" while walking across the plant floor. Because Claimant did not advise her that he had hurt his back at work, Nurse Goff advised him to see his family doctor, Dr. Trevino.

At Nurse Goff's suggestion, Claimant visited Dr. Trevino's office, and saw Dr. Trevino's assistant. At his deposition, Dr. Trevino confirmed that his office notes show that Claimant reported a history of chronic pain but that his injury was a result of walking; and Claimant believes he "said something to that affect." No other cause was mentioned, and Dr. Trevino's assistant recommended that Claimant see Dr. Carter, an orthopedic surgeon.

During his initial appointment with Dr. Carter on May 11, 2005, Claimant filled out a patient history form. In response to the question: "how did the accident(injury) occur;" Claimant responded: "First while walking - second sitting down." Later, Dr. Carter discussed with Claimant the circumstances of his injury and his office notes reflect Claimant's report: "He 12 days ago suffered a catch in his back while walking and then 4 days after that while cleaning a refrigerator he was unable to stand." The record thus reflects that Claimant attributed his condition to a walking incident several times shortly after it allegedly occurred. Yet, his reports did not remain consistent.

Dr. Carter eventually referred Claimant to Dr. Golovac for pain management. Claimant testified that he told Dr. Golovac that he experienced pain while walking across the plant floor; however, Dr. Golovac's office notes mention nothing about that incident. According to Dr. Golovac, Claimant reported only the incident lifting the doors; and, indeed, he testified that if Claimant advised Dr. Carter that he injured himself walking across the plant floor that would be inconsistent with history Claimant gave him. The record further shows that Claimant failed to mention on the insurance claim form he filed, on his Department of Labor claim form, or on his Department of Labor LS-203 form that the onset of his symptoms occurred while he was walking across the plant floor. That etiology does, however, surface again on July 19, 2006, when Dr. Michael Broom examined Claimant and obtained a symptom history which included the incident walking across the plant floor.

The record shows that Claimant mentioned the pain he allegedly experienced walking across the plant floor to Nurse Goff and Drs. Trevino, Carter, and Broom. He claims that he also mentioned it to Dr. Golovac, but Dr. Golovac denies that Claimant advised him of any cause for his injury other than the incident lifting the doors, and Dr. Golovac's denial is consistent with Claimant's denial that he suffered any injury at work on the disability insurance claim form he filed and is further consistent with the Department of Labor LS-18 form and the Department of Labor LS-203 form, filed on his behalf. In Dr. Golovac's opinion, the history of injury associated with walking across the plant floor Claimant provided to his other physicians was inconsistent with the history he gave Dr. Golovac.

Under these circumstances, I am unable to conclude that Claimant's report that this incident occurred is credible given the alleged presence of witnesses who were not called to testify, the contrary testimony provided by Claimant's supervisor that directly contradicted Claimant's account, and the inconsistent history of events that Claimant provided not only to his doctors but on claim forms he filed seeking disability benefits. These discrepancies are not within an expected range of reasonable variation in a case of this type. The record is, accordingly, devoid of credible evidence essential to invocation of the Section 20 presumption based upon the notion that a walking incident[7] occurred on April 28, 2005, which caused harm to Claimant's low back. Bolden v. G.A.T.X. Terminals, Corp., *supra*.

[7] In Cairns v. Matson Terminals, 21 BRBS 252 (1988), it was determined that the aggravation or contribution to a pre-existing condition constituted part of his injury if it is found that the claimant credibly testified that he did experience pains at work.

Cleaning the Washer/Dryer

After the weekend, following the alleged door lifting and walking incidents, Claimant returned to work. Near the end of the day, he relates how he was sitting on a stool, cleaning a washer/dryer under a platform in a small space in the port stateroom of the 680 Super Sport when he felt pain in his low back and, at the hearing testified: "I lost it. It actually threw my body to where I fell on the floor and got, and was stuck in the corner; I couldn't move." Claimant testified that Tim Grenet picked him up, put him on the bed, and "cover[ed] for him" by sweeping up the stateroom. Claimant testified that he remained in the bed for about 45 minutes then got up, but everyone had gone home, and he clocked out and went home. As previously noted, Grenet was not called to testify in this proceeding.

When Claimant arrived at work the next day, Carlile, who had spoken with Grenet, asked Claimant about his back. Claimant testified that he told Carlile about the washer/dryer incident. Carlile confirmed that Claimant mentioned that he felt something "pop" while walking across the plant floor, but specifically denied Claimant's assertion that he mentioned lifting doors or cleaning the washer/dryer. Claimant testified he later told Nurse Goff about the incident cleaning the washer/dryer; however, Nurse Goff also denied that he mentioned that incident to her.

Claimant testified that he told Dr. Trevino's assistant how he hurt his back lifting heavy objects at work, but he could not recall if he mentioned the specific incidents. Dr. Trevino's office notes indicate that Claimant reported that the injury was a result of walking. The office notes do not mention anything about falling off a stool or cleaning a washer/dryer as part of the accident history Claimant provided.

Claimant testified that he also gave Dr. Carter his complete history, including the incident cleaning the washer and dryer. At his deposition on October 20, 2006, however, Dr. Carter denied Claimant ever gave him an accident history which included cleaning a washer/dryer. He testified that Claimant told him he was walking and cleaning a refrigerator at home. Claimant, of course, suggested that Dr. Carter simply erred in recording the type of appliance he was cleaning and where he was cleaning it; but Dr. Carter was not persuaded. Dr. Carter testified that, in his experience, had Claimant been injured cleaning a washer/dryer at work, he would have expected Claimant to report the incident. Instead, Dr. Carter

explained that cleaning out the refrigerator was apparently significant to Claimant because that was an incident Claimant reported to him.

Claimant next saw Dr. Golovac. The record shows that the only injury history Claimant provided to Dr. Golovac involved the incident lifting the doors. The incident cleaning the washer/dryer was not mentioned to Dr. Golovac, and, indeed, Dr. Golovac testified that if Claimant reported to Dr. Carter that he was injured cleaning a washer/dryer or a refrigerator, it would be inconsistent with the history Claimant gave him.

Dr. Michael Broom also obtained a symptom history which included Claimant's prior accidents; the alleged incident lifting six 50 pound doors, and later the same day while walking. Dr. Broom's report does not mention the washer dryer/dryer incident, and he testified that Claimant did not tell him about the washer/dryer incident. Dr. Broom did, however, note an incident involving a refrigerator in Dr. Carter's notes, but the note did not indicate the incident occurred at work. Finally, the record shows that Claimant failed to mention the washer/dryer incident when he filed for disability insurance, nor was it mentioned in the Department of Labor LS-18 or LS-203 forms filed on his behalf in pursuit of his Longshore claim.

Here again, then, is a situation in which Claimant testified that a co-worker, who was not called to testify, actually witnessed the incident in the stateroom of the Super Sport and helped him off the floor and into a bed. According to Carlile, the co-worker, Grenet mentioned to him only that Claimant's back was bothering him, not that he was injured falling off a stool or cleaning a washer/dryer or performing any work-related activity. As a result, Claimant's statements in reporting the incident, and his testimony about the incident, exhausts the record evidence indicating that cleaning the washer/dryer caused him harm; and while this might otherwise be sufficient in other circumstances, there are, again, discrepancies in Claimant's reports which reflect adversely on the credibility of this evidence.

Although Claimant repeatedly testified that he reported this incident to his supervisor, Nurse Goff, Dr. Trevino's office, and to Drs. Carter, Golovac, and Broom, all testified that this was not an incident Claimant mentioned in the context of providing the history of his injury. Indeed, even Dr. Carter, who Claimant suggested confused the washer/dryer at work with a refrigerator at home, believed his office notes correctly recorded the history as Claimant related it. Further, the co-worker who allegedly witnessed the incident, and could have allegedly

corroborated Claimant's account, was not called to testify in this proceeding. Under these circumstances, the overwhelming weight of the evidence produced by Employer witnesses, Claimant's own physicians, and the injury reports Claimant eventually filed for disability insurance and Longshore benefits all contradict Claimant's testimony that this incident was ever reported, and it undermines Claimant's credibility that it ever occurred.

Under these circumstances, the discrepancies in Claimant's reports are not within an expected range of reasonable variation in a case of this type. The record is, accordingly, devoid of credible evidence essential to a prima facie case. As such, an evidentiary basis sufficient to invoke the Section 20 presumption based upon the notion that an incident occurred while Claimant was cleaning a washer/dryer at work on May 3, 2005, which caused harm to his low back has not been established. Bolden v. G.A.T.X. Terminals, Corp., *supra*.

Non-Work Related Cause

Carlile testified he first heard about Claimant's problem from Grenet and he confirmed with Mike Archer and Tim Burgess that Claimant had been complaining about his back. Carlile also reported that Grenet advised him that he had helped Claimant clean the port stateroom because Claimant's back was "bothering him." In his post-hearing brief, Claimant argued again that Grenet, Burgess, and others advised Carlile that he injured his back "on the job," or "at work" or as a result of "working in the port stateroom." Cl. Br. at 5, 13. Yet the nexus to Claimant's work is an embellishment the record does not support.

Carlile testified credibly that none of these employees suggested that Claimant was injured at work; and Carlile's recollection of the reports he received from Claimant's coworkers is consistent with Claimant's statement on the Group Disability Insurance Claim Form he filed on May 18, 2005. Specifically, Claimant was asked: "Is the injury work related" and he responded: "no." At his deposition, Claimant testified that he did not file for workers' compensation because he did not: "know what I had done to myself;" but he continued that he did know that whatever he did, he "did it at work." At the hearing he explained, at one point, that he had "no idea" how his recent back pain started, then testified incongruously that he thought that an injury triggered by carrying heavy doors at work and cleaning the washer/dryer at work was not a work-related injury.

These discrepancies are not within the range of reasonable variation. It is understandable that Claimant might not have known what it was he had done to

himself; but assuming he experienced the three reportedly discrete pain-triggering accidents, two of which were allegedly witnessed by his supervisor or co-worker, as he described them, his testimony that he did not appreciate that his problem was work-related lacks credibility. Thus, his testimony describing three accidents at work is irreconcilable with his statement on the disability claim form describing his problem as a non-work related injury.

Physician Assessments of Claimant's Medical History

The record further shows that each physician who evaluated the cause Claimant's condition relied upon the history of onset that he provided. Dr. Golovac, for example, testified that his assessment of the etiology of Claimant's condition was based upon the history of lifting heavy doors provided by Claimant. If, however, Claimant told Dr. Carter he injured his back while walking, which he did, Dr. Golovac testified that would be inconsistent with the history Claimant gave him. It would also, according to Dr. Golovac, be inconsistent if Claimant told Dr. Carter that he was cleaning a refrigerator or a washer/dryer, or reported to Dr. Carter that he had injured his back many years before lifting heavy equipment, and again in a car accident ten years previously, or that he hurt his back lifting groceries on May 25, 2005. According to Dr. Golovac, Claimant did not provide him with a history which included any of these incidents. Dr. Golovac further confirmed that the history Claimant gave to Dr. Trevino was inconsistent with the history Claimant gave him.

Like Dr. Golovac, Dr. Broom confirmed that, in assessing causal relationship, the patient history is, in his opinion, the most important factor to consider; and he expects the patient to be honest in reporting his injury history. Detecting the inconsistencies in Claimant's prior injury reports, Dr. Broom testified that if Claimant's low back condition developed after he lifted heavy doors, his condition likely would relate to that. If it originated while he was walking without any antecedent physical work, then it would, in his opinion, be more likely a spontaneous herniation, and Dr. Broom would not consider it an injury due to a work-related activity.[8] Dr. Broom noted that Claimant's condition was consistent with a slow progression due to his pre-existing injuries, but observed that: "the history we receive from the patient is more important in that regard as to what precipitated symptoms." Consequently, based upon Claimant

[8] As discussed in footnote 6 *supra*, had credible evidence that the walking incident actually occurred been adduced in this record, it may have triggered the presumption, rendering it necessary to consider Dr. Broom's etiology evaluation on rebuttal.

report of lifting heavy doors, Dr. Broom opined that his current condition is work-related, and installing and cleaning a washer/dryer would aggravate his condition.

Yet, as determined above, none of Claimant's various reports of pain or the working conditions or accidents that allegedly triggered the pain are credible. There is evidence in the record that Claimant may have told co-workers that his back occasionally "bothered" him, but the record fails to establish that he suffered actual incidents of pain or "harm" at work or that working conditions existed or accidents occurred at work that could have caused pain. Claimant has, therefore, failed to establish a prima facie case under the Act.

Employer's Safety Program

Finally, Claimant insinuates that the Employer's Safety Program is responsible for the discrepancies and inconsistencies which permeate Claimant's account of the history of his injury. In his post-hearing brief, Claimant argued:

> The court seemed reluctant to allow testimony or give credence to the fact that Sea Ray Boats had a program which was designed to eliminate workers' compensation claims. The court indicated there wasn't sufficient evidence. Claimant's counsel believes this matter does provide sufficient evidence and wishes to present argument. Cl. Br. at 7.

Counsel affirmatively misrepresents the record. At the hearing, Claimant was afforded a full opportunity to develop testimony regarding the Employer's Safety Plan. Claimant's attorney cross-examined Randy Serfozo the assembly manager at Employer's Sykes Creek Plant, and following took place:

> Q. Does Sea Ray have any kind of program where they try to go as many days as possible without an accident?
>
> A. Certainly.
>
> Q. What is it called?
>
> A. I don't know that it's called anything but we certainly are very diligent to try to make our workforce as safe as

possible, and we do have records of when accidents take place and what they were.

Q. Who owns Sea Ray?

A. Brunswick is our parent.

Q. And do they have a policy that they give you the gold star or something else if you go a certain amount of without an accident?

A. I don't know if Brunswick gives us anything. I know that Sea Ray has goals for – amount of accidents and so on like that.

Q. Okay, Maybe you can answer this question and maybe you can't. I have probably been involved in litigation with Sea Ray on about, oh, thirty or forty cases and in every one of them they say the employee never reported the accident; do you have any idea why that happens?

Employer's Counsel: Whoa, let me just object.

Recognizing that he had, perhaps, overstepped the most liberal boundaries of evidentiary development permitted in administrative adjudication, Counsel responded:

Mr. Schwartz: I'll withdraw the question.

Judge Levin: Sustained.

Mr. Schwartz: Withdrawn. I have no further questions…. Tr. 112-13

Counsel was thus limited in his effort to develop the record only to the extent he became a witness by prefacing his question with his personal experience in other cases; and, in fact, he withdrew his question in response to Employer's objection prior to the ruling.

The matter was, however, visited again by Claimant's counsel during cross-examination of Lisa Bauman, the human resources manager at the Sykes Creek Plant. She testified:

> Q. Okay. Now, is there a program there at Sea Ray where you are striving to reach a certain amount of days without an accident?
>
> A. Without an accident?
>
> Q. Correct.
>
> A. No
>
> Q. Okay, So, you're saying that there is no such program?
>
> A. We do track our reportable accidents.
>
> Q. Okay. Well if Mr. Serfozo was to say the "Yeah, we have a program, we're trying to avoid all accidents, and we are recognized for that," you would say that's a lie?
>
> A. No, we don't want to hurt anyone, I mean --
>
> Q. Okay. But is there any kind of recognition given for not having a certain amount of workman's comp accidents?
>
> A. We have certain goals certainly--
>
> Q. Okay.
>
> A. –that are set for the facility --
>
> Q. And is there recognition granted to certain parties when you reach a certain level?
>
> A. It's granted to everyone in years we get a bonus, the entire facility, every individual.

> Q. Okay. And do certain people get recognized for this having happened?
>
> A. Everyone, the entire facility gets recognized.
>
> Q. Okay. It's a good thing to avoid these workman's comp accidents?
>
> A. It's always a good not to hurt people--
>
> Q. Any manner or form.
>
> A. Can I – it's always good not hurt people at any time. We want people coming into our facility in same condition – leaving in the same condition that, that they came through the gate --.
>
> Q. Not hurt people, is that what you said?
>
> A. We don't want to hurt anyone.
>
> Q. Okay. And that's why you had Mr. H. fired?
>
> A. Mr. H. was involved --
>
> Employer's counsel: Objection, Your Honor, argumentative.
>
> Judge Levin: Sustained. Tr. 181-82.

Again, Counsel was limited in his effort to develop the record only to the extent that one of his questions was ruled argumentative; he was, however, free to continue, but he abandoned that line of questioning in favor of an inquiry into privileged attorney/client communications between the witness and Employer's counsel. Tr. 183-186. He revisited the matter in his closing argument, however, contending: "Now, I have no idea Sea Ray has a – very long record of trying to avoid all workman's comp compensation accidents, **I would not allege that that was a part of it,** [but] I'd like the Court to consider it…." Tr. 205. (Emphasis added).

The record thus shows that Claimant, contrary to the argument in his post-hearing brief, was not unduly restricted in his development of testimony regarding Employer's job safety policies. He simply raised, by innuendo, that the policy somehow adversely affected the development of the claim even as he represented at the hearing that he certainly was not alleging anything of the sort. The record shows that Employer provided recognition, plant-wide, if certain safety goals were met; but, beyond that, as noted at the hearing, Claimant demonstrated little else. Tr. 205.

Still displeased, however, Claimant argued in his post-hearing brief that: "Claimant's counsel believes this matter does provide sufficient evidence and wishes to present the argument," Cl. Br. at 7, but the reader is left to ponder: sufficient evidence of what is provided; and the argument presented in the next sentence of Claimant's brief never quite discloses what is counsel believes the Employer's job safety policy establishes that is relevant to the claim. Indeed, Claimant himself never suggested that the policy discouraged him from filing his Longshore Act compensation claim. He explained his reasons for initially claiming a non-work related disability, but the Employer's job safety policy was not mentioned. It is not, then, a question of according credence to the evidence addressing the Employer's Job Safety Program, but rather what conclusions reasonably can be drawn from the evidence adduced. Research reveals no case in which the mere existence of a job safety program was held nefarious, and Claimant has cited none. Beyond that, Claimant has proved little else. Having thus considered the job safety policy in the context of this record, its existence does not affect the outcome of this case.

Greenwich Collieries

Finally, Claimant argues that he has adduced sufficient facts to invoke the presumption, and, citing Friend v. Britton, 220 F.2d 820 (D.C. Cir. 1955), argues that: "any doubts about that…, including the factual, are to be resolved in favor of the Employee or his dependent family." Cl. Br. at 17. Yet, Claimant's research is a bit dated.

Although I find the evidence in this record neither doubtful nor in equipoise; assuming it was evenly balanced, it would not support the relief Claimant seeks. To the contrary, in 1994, the Supreme Court addressed the "true doubt" principle in Director v. Greenwich Collieries, 512 U.S. 267 (1994). In Greenwich Collieries, the Court struck down administrative rulings and stripped away the precedential

authority of lower court decisions that had previously ruled in favor of claimants under circumstances in which "true doubt" existed in respect to whether they had adduced sufficient evidence to establish an essential element of their case. The Court ruled, instead, that the Administrative Procedure Act imposed the burden of proof upon claimants; and, accordingly, when the evidence is in equipoise and "true doubt" exists, that burden has not been satisfied. As a result of the Supreme Court's decision in Greenwich Collieries, where "true doubt" exists or the evidence is in equipoise, a claimant can not prevail. Moreover, the principle articulated in Greenwich Collieries applies equally to a claimant's the burden of proof in establishing a prima facie case under the Longshore Act. Maher Terminals, Inc. v. Director, 992 F.2d 1277(3rd Cir. 1993), aff'd sub nom. Director v. Greenwich Collieries, *supra;* Holmes v. Universal Maritime Service Corp., 29 BRBS 18 (1995) (Decision on Recon.). Therefore, for all of the foregoing reasons:

Order

IT IS ORDERED that the claim for benefits under the Longshore Act filed by R.C.H., III, be, and it hereby is, denied.

A

Stuart A. Levin
Administrative Law Judge

Bolden v. G.A.T.X. Terminals, Corp., 30 BRBS 71 (1996) (claimant failed to establish an essential element of his prima facie case due to inconsistencies in his testimony regarding the date of the alleged work accident and his failure to report the incident to his physician.)